Supreme Court, U.S.
FILED

03 594 JUL 14 2003

OFFICE OF THE CLERK

In the

# Supreme Court of the United States

SERGIO J. RODRIGUEZ, *et al.*,

*Appellants*,,

*v.*

BEXAR COUNTY, TEXAS, *et al.*,

*Appellees.*

On Appeal From
The United States District Court
For The Western District Of Texas
(Three Judge Court)

## JURISDICTIONAL STATEMENT

Leslie Stephen Mendelsohn
(Les Mendelsohn)
*Counsel of Record*
LES MENDELSOHN &
110 Broadway, Suite 500
San Antonio, Texas 78205
(210) 222-2271
les@lmalaw.com

Judith Sanders-Castro
9122 Autumn Skies
San Antonio, Texas 78254
(210) 680-7746
sanders-castro@juno.com

*Attorneys for Appellants*

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦USSCINFO.COM

78 pp

## QUESTIONS PRESENTED

1. Whether a governmental unit may begin a state election process to elect political party nominees in a primary election from voters in one geographic election district, but conclude the election process by conducting the general election from voters in a different geographic election district without seeking preclearance for such change in that voting standard, practice, or procedure, thereby changing the practice to nominate a political party candidate from a primary election to a precinct chair election at a convention.

2. Whether a political party which changes its standard to determine a majority to nominate candidates to fill a vacancy from authorized to actual members of its applicable executive committee must obtain preclearance of such change in that voting standard.

3. Whether Appellants introduced sufficient evidence that in 1972 (the benchmark year for § 5 of the Voting Rights Act, 42 U.S.C. § 1973c) the Bexar County Democratic Party elected persons to fill vacancies by a majority vote of authorized members, but in 2002, it filled vacancies by a majority vote of actual members.

## PARTIES TO THE PROCEEDINGS

Plaintiffs

Sergio J. Rodriguez, Jose G. Farias, Doroteo M. Montelongo, Ruben C. Tejeda, Mauricio Aragon, Marcario R. Ramirez, Troy Hitchings, Diane Patterson Lopez, Mark Olivares, Yolanda R. Pacheco, Frank Pacheco, Richard Giprich, Grace Vasquez and Steve Lopez.

Defendants

Bexar County, Texas, by and through the Commissioners Court of Bexar County, Texas; Republic Party of Bexar County, Texas, by and through Roy Barrera, Jr., In Official Capacity as Chairperson of the Republican Party of Bexar County, Texas; Democratic Party of Bexar County, Texas, by and through Gabe Quintanilla, In His Official Capacity as Chairperson of the Democratic Party of Bexar County, Texas.

## TABLE OF CONTENTS

Questions Presented ..... i
Parties to the Proceedings ..... ii
Table of Contents ..... iii
Table of Authorities ..... iv
Opinion Below ..... 1
Jurisdiction ..... 1
Statutory Provisions ..... 1
Statement of the Case ..... 2
The Questions Presented are Substantial ..... 4
Conclusion ..... 30
Appendix
District Court Decision (4/8/03) ..... 1a
District Court Decision (4/10/03) ..... 20a
Notice of Appeal ..... 29a
Relevant Statutes Involved ..... 32a

# TABLE OF AUTHORITIES

**CASES**

ALLEN V. STATE BOARD OF ELECTIONS, 393 U.S. 544 (1969) ..... 6, 15, 18

AVERY V. MIDLAND COUNTY, TEXAS, 390 U.S. 474 (1967) ..... 16

BUSBEE V. SMITH, 549 F. SUPP. 494, 497 N.1 (D.D.C. 1982) (THREE-JUDGE COURT), AFF'D 459 U.S.1166 (1983) ..... 16

CITY OF LOCKHART V. UNITED STATES, 460 U.S. AT 131-32 ..... 17

CLARK V. ROEMER, 500 U.S. 646, 654 (1991) ..... 13, 14

CONNOR V. WALLER, 421 U.S. 656 (1975) ..... 14

ECTOR COUNTY V. STRINGER, 843 S.W.2D 477, 479 (TEX. 1992) ..... 2

FOSTER V. LOVE, 522 U.S. 67, 71 (1997) ..... 15, 19

GEORGIA V. UNITED STATES 411 U.S. 526 (1973) ..... 16

HATHORN V. LOVORN, 457 U.S. 255, 269 (1982) ..... 14

LOPEZ V. HALE COUNTY, TEXAS, 797 F. SUPP. 547, 548 (N.D. TEX. 1992) ..... 19, 20

LOPEZ V. MONTEREY COUNTY, 519 U.S. 9, 20 (1996) ..... 12

MCCAIN V. LYBRAND, 465 U.S. 236, 251, 257 (1984) ..... *passim*

N.A.A.C.P. V. HAMPTON COUNTY ELECTION COMMISSION, 470 U.S. 166, 180 (1985) ..... 17

PERKINS V. MATTHEWS, 400 U.S. 379, 378 (1971) ..... 14, 16, 18

PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. V. CITY OF NEW YORK, 679 F. SUPP. AT 76 ..... 16

STATE OF SOUTH CAROLINA V. UNITES STATES, 585 F. SUPP. 418, 421 (D.D.C. 1984) ..... 16, 17

TERRAZAS V. SLAGLE, 821 F. SUPP. 1154, 1159 (W.D. TEX. 1992) ..... *passim*

UNITED STATES V. CLASSIC, 313 U.S. 299, 319-20 (1941) ..... 15, 19

YOUNG V. FORDICE 520 U.S. 273 (1999) ..... 13, 18, 28, 30

**STATUTES, RULES & REGULATIONS**

28 U.S.C. § 1253 ..... 1

28 U.S.C. § 2284(b)(3) ..... 1, 3

42 U.S.C. § 1973 ..... 13, 18

42 U.S.C. § 1973c ..... 1, 4, 7, 8

Texas Constitution, art. 5, § 1 ..... 1

Texas Constitution, art. 5, § 18(a) ..... 1, 2

## OPINION BELOW

The opinion and judgment of the district court are not reported but are reproduced in the attached Appendix, consisting of the majority opinion (App. 1) and concurring opinion but dissenting as to parts IIB and III (App. 20).

## JURISDICTION

The action challenged the unprecleared election structure contained in the Bexar County Commissioners Court's Order dated August 28, 2001. The memorandum opinion of the three-judge court denying plaintiffs all relief sought and a separate opinion, dissenting in part, was entered on April 14, 2003. Notice of Appeal was filed on May 14, 2003. (App. 29 ).

This appeal is being docketed in this Court within sixty days after the filing of the notice of appeal in the district court. Jurisdiction of this Court is invoked under 28 U.S.C. § 1253 and 42 U.S.C. § 1973c.

## STATUTORY PROVISIONS

The statutory provisions involved herein include the following:

1. 28 U.S.C. § 2284(b)(3) (App. 32a)

2. 42 U.S.C. § 1973c, Voting Rights Act of 1965, § 5 (App. 33a)

3. TEXAS CONSTITUTION, art. 5, § 1 (App. 35a)

4. TEXAS CONSTITUTION, art. 5, § 18(a) (App. 35a)

5. TEX. LOC. GOV'T CODE, § 81.021(a) (App. 36a)

6. TEX. ELEC. CODE, § 31.001 (App. 40a)

7. TEX. ELEC. CODE, § 31.003 (App. 40a)

8. TEX. ELEC. CODE, § 202.003 (App. 37a)

9. TEX. ELEC. CODE, § 276.006 (App. 38a)

## STATEMENT OF THE CASE

Each county in the state of Texas with the population of 50,000 or more, according to the most recent federal census, is divided into no less than four (4) nor more than eight (8) justices of the peace and constable precincts. TEX. CON., art. 5, § 18(a) (App. 35a). On August 28, 2001, Bexar County, through its governing body, the Bexar County Commissions Court[1] ordered that effective January 1, 2002, the then existing five (5) precincts are reduced to four (4), that Precinct 5 is abolished and that virtually all of Precinct 5 is incorporated into Precinct 1, the same to be submitted for preclearance to the United States Attorney General on September 5, 2001. (App.1a-3a).

Because Bexar County did not submit a preclearance request, Appellants, on November 19, 2001, filed this action alleging that preclearance of the plan was required but had not been requested or received (Docket Entry No. 1) and sought a Temporary

---

[1] Texas commissioners courts enjoy executive, legislative and judicial powers and duties. **Avery v. Midland County**, 390 U.S. 474, 482 (1968); **Ector County v. Stringer**, 843 S.W.2d 477, 479 (Tex. 1992).

Restraining Order (Docket Entry No. 2) which the trial court, on November 21, 2001, issued on a specific finding that irreparable damage would result if not granted, enjoining Bexar County from implementing the plan for ten (10) days (Docket Entry No. 3), which order was not revoked and remained in force until the hearing by the three-judge court on December 16, 2001. 28 U.S.C. § 2284(b)(3) (App.32a).

Appellants moved to file their Fifth Amended Complaint on August 9, 2002 (Docket Entry No. 59), which was granted on August 16, 2002 (Docket Entry No. 60) and moved to file a supplement to Appellants' Fifth Amended Complaint on September 17, 2002 (Docket Entry No. 74), which was granted on September 24, 2002 (Docket Entry No. 87). Although the plan to reduce the five (5) precincts to four (4) was precleared on May 15, 2002 (App. 4a), on September 16, 2002, Appellants filed a Motion for Temporary Restraining Order (Docket Entry No. 73) that the election for Justice of the Peace, Precinct 1, Place 3 be abated because Bexar County had not precleared (1) the change in voting practice to begin the election process by holding a primary election in one geographic area but the general election in a different geographic area with different voters, so that the nominee selected by party voters in a primary election is replaced by one selected by party precinct chairs at a convention, and (2) conducting an election where a political party nominates its candidate from a majority of actual rather than authorized executive committee members. An order had been entered on December 19, 2001, constituting a Three-Judge Court. (Docket Entry No. 18). A second order that the same three-judge court be convened was issued on September 23, 2002 (Docket Entry No. 86).

On October 2, 2002, the trial court denied the motion for a temporary restraining order (Docket Entry No. 94). Appellants' Motion for Reconsideration (Docket Entry No. 93) was denied (Docket Entry No. 97) on October 4, 2001. At trial on December 16, 2002, the court below failed to consider Appellants' Section 5 Pre-Trial Brief (Docket Entry No. 111). See App. 12, n. 11 (... Plaintiffs did not submit a pre-trial brief to the court ...).

The three-judge court misunderstood Appellants' complaint to be that the timing of the change in the voting practice or procedure was not precleared (App 8a - 12a), but the complaint was that a unit of government may not implement a plan to redistrict once the election process has begun, so that it must not create a change in the continuum of the election procedure by conducting a primary in one geographic area with one set of voters and the general election in a different geographic area with a different set of voters without preclearance. Secondly, as identified by Judge William Wayne Justice in his separate opinion, the majority confused the standard challenged by Appellants. Appellants complained that the Bexar County Democratic Party conducted an election to fill a vacancy where a majority of **actual** Precinct 1 Executive Committee members was utilized in 2002; whereas, in 1972, the benchmark year for applying 42 U.S.C. § 1973c to Texas, the standard was that a majority consisted of **authorized** members. The majority of the three-judge court erroneously contended that Appellants complaint was about a completely different subject: a quorum.

## THE QUESTIONS PRESENTED ARE UBSTANTIAL

This case is one of first impression in the United States Supreme Court. May a governmental unit hold a general election under a redistricting plan different from

the plan used for the preceding primary election? Must such a governmental unit specifically submit such change in voting practice for preclearance? This Court has not squarely addressed the issue of whether an election process must continue to completion once begun or whether a state governmental unit, which may dislike the candidates nominated in the primary election or for any other reason, may redistrict, so that the candidate elected by the voters in a political party's primary election may not be the political party's nominee if, pursuant to state law, a local political party's executive committee may select the nominee.

The United States Supreme Court has concluded that a political party primary election is part of the election process.[2] Two (2) three-judge courts in Texas[3] have recognized that the election process, once begun with the conducting of a party primary election, is a continuum through the general election, which may not be interrupted and which, herein, should not have been interrupted until the following election cycle in 2004.

The issue is particularly important because units of state and local government, by the decision below, are authorized to redistrict election units after a political party's primary election process has begun, after candidates filed for nomination by their political parties in primary elections or after the parties select their nominees in a primary election. The effect of this practice is to nullify the party nominees elected by

---

[2] **United States v. Classic**, 313 U.S. 299 (1941); **Foster v. Love**, 522 U.S. 67 (1997).

[3] **Terrazas v. Slagle**, 821 F. Supp. 1154 (W.D.Tex. 1992)(three judge court); **Lopez v. Hale County, Texas**, 797 F.Supp. 547 (N.D.Tex. 1992)(three judge court).

voters in a political party primary and substitute for them nominees selected by political party chairs at a party convention.

The holding below conflicts with the holdings of the Supreme Court that a request for preclearance of certain identified changes in election practices which fail to identify other election practices as new ones may not be considered as an adequate submission of the latter practices.[4] The court below chose form over substance by holding that, by eliminating an election district (Justice of the Peace and Constable Precinct 5) between the primary and general election dates, there is no required continuum of the election process because Bexar County received preclearance for a new four (4) district election plan into which Precinct 5 was subsumed. That holding begs the question: whether a governmental unit may terminate the election process once it has begun or whether it must continue to completion such election process, so that the change must begin for the first time in the next election cycle, i.e., 2004.

The second question is narrower than the first but equally important to the integrity of the election process. The majority below applied the wrong legal standard to conclude that Appellants' evidence was not sufficient. Whereas, Appellants alleged and proved that the standard was changed as to how a political party determines a majority vote to fill a vacancy, the majority below contended that the issue was the standard to determine a quorum. All fifty (50) states hold primary elections to nominate major political party candidates.

---

[4] **McCain v. Lybrand**, 456 U.S. 236, 256-57 (1984); **Clark v. Roemer**, 500 U.S. 646, 659 (1991); **Allen v. State Board of Elections,** 393 U.S. 544, 571 (1969).

All states' political parties utilize a procedure for filling vacancies whether for general election candidates when there is no existing party nominee or to fill vacancies in the parties' executive committees. Answering the question presented will not only serve the instant election and other elections in the State of Texas, but also will provide a precedent for elections in the other states as well.

## The Issues in this Case Are Substantially Sufficient to Invoke the United States Supreme Court's Jurisdiction.

**I.** Bexar County, as required by § 5 of the Voting Rights Act (42 U.S.C. § 1973c), did not seek preclearance from the United States Attorney General of a voting practice to begin an election cycle to nominate candidates by a state-sanctioned political party primary in one geographic area with one set of voters but to continue the election process by conducting the general election in a different geographic area, with a different set of voters, thereby changing the practice for selecting nominees by political parties for a general election by party voters in a primary election to a precinct executive committee convention selection by precinct chairs.

### A. Background

On August 28, 2001, the Bexar County Commissioners Court, the governing body for Bexar County, Texas, adopted orders accepting the redistricting plan for Justice of the Peace and Constable Precincts effective January 1, 2002; abolishing Justice of the Peace and Constable, Precinct 5; creating the full-time position of Justice of the Peace, Precinct 1, Place 3 and appointing Edmundo Zaragoza as Justice of the

Peace, Precinct 1, Place 3, effective January 1, 2002; accepting the Redistricting Plan for Justice of the Peace, Precinct 2 and subsequent modification to the Redistricting Plan for Justices of the Peace, Precincts 1, 2 & 3; and agreed to submit said plans to the U.S. Department of Justice (DOJ). Minutes of August 28, 2001, Bexar County Commissioners Court meeting, Volume 544, pp. 103-104, Bexar County Records (App.1a-3a).

The court below erroneously stated that Bexar County submitted the plan to DOJ on November 10, 2001. (App. 3a, n.4). In actuality, when Appellants filed this action on November 19, 2001, alleging, among other things, a violation of § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (Docket Entry No. 1), Bexar County had not yet submitted any redistricting plan to the United States Attorney General for § 5 preclearance administrative review nor had it filed an action in the District Court for the District of Columbia seeking a § 5 preclearance order. The Commissioners Court Order stipulated in its ratification action of the Plan that it would be submitted for preclearance September 5, 2001 (App. 3a). No submission regarding any redistricting plan was made by Bexar County until well after November 21, 2001. The trial court, in issuing its order granting Appellants' Motion for Temporary Restraining Order (Docket Entry No. 3, p. 2), found that [Bexar County had] not submitted the election changes to the United States Attorney General for preclearance review nor filed an action in the United States District Court for the District of Columbia seeking a declaration that the changes affecting voting do not have the purpose or effect of discriminating against voters because of their race, ethnicity or membership in a language minority.

On November 21, 2001, the action was transferred from the Honorable H. F. Garcia, United States District Judge, to the docket of United States District Judge William Wayne Justice (Docket Entry No. 4). Filing for candidacy in political parties began on December 3, 2001, in preparation for the 2002 primary election began. Although Bexar County sought to implement the Plan or to hold elections in both Justice of the Peace, Precinct 5 and Justice of the Peace, Precinct 1, Place 3, the trial court declined the invitation and ruled that, until precleared, candidates would seek political party nomination pursuant to the then-existing election system (Docket Entry No. 17). The political party primary elections were conducted on March 12, 2002. Preclearance of the County's redistricting plan for Justices of the Peace and Constables was not issued until May 15, 2002, after both political party primary and primary run-off elections had been conducted.[5]

On December 19, 2001, the chief judge of the United States Court of Appeals for the Fifth Circuit signed an order constituting a three-judge court. (Docket Entry No. 18). That same day the trial court entered an order denying Bexar County's motion to dismiss the § 5 claim and declined the Appellees' invitation to allow implementation of a dual filing procedure, in which candidates would file for election under both plans [the existing plan for Justices of the Peace and Constables, which included Precinct 5 and the County's unprecleared but proposed plan which eliminated Precinct 5 and established a new position for Justice of the Peace in Precinct 1 as Place 3] prior to full

---

[5] The Department of Justice in January 2002, asked Bexar County for additional information to which the County did not respond for two (2) months, until March 29, 2002, after the party primary elections.

consideration of the Appellants' application for injunctive relief. (Docket Entry No. 17). During the following 12 months, the single trial judge denied each of Bexar County's motions to dismiss Appellants' claims and motions for summary judgment. The § 5 trial was held on December 16, 2002. On April 4, 2003, the three judge court denied Appellants all relief sought (App. 1a - 19a), with Judge Justice dissenting on one issue. (App.20a-28a).

The court below "presumed" that the author of the preclearance letter, if he thought about it, knew that the redistricting plan implementation date (May 15, 2002) would fall between the date of the primary election (March 12, 2002) and the general election (November 5, 2002) (App. 11a - 12a), so that the Attorney General must have approved the practice or procedure of Bexar County's negating the continuum of the election process once begun, thus rendering the primary elections a nullity and in authorizing the political parties to nominate by precinct convention the nominees previously elected by the people during a party primary. However, the Attorney General never was asked to consider the issues before the court below or this Court.

Erroneously, the court below claimed that Appellants contended that the Justice of the Peace position was merely transferred from Precinct 5 to Precinct 1, Place 3, while, in truth and in fact, Justice of the Peace, Precinct 5 was abolished, and Justice of the Peace, Precinct 1, Place 3 was an entirely new office. (App. 9a -10a). As a matter of form, the court below is correct. As a matter of substance, it is absolutely incorrect. Bexar County changed without preclearance the practice for selecting nominees by the political parties for elective office by abrogating the previously-

held primary elections and replacing them with appointed nominees elected by the political party's precinct chairs at a convention.

Jesse Alaniz testified that he is a resident of former Precinct 5 and sought to be elected as a Democratic Party nominee for Justice of the Peace. He ran unsuccessfully against the incumbent, Judge Edmundo M. Zaragoza. However, in the general election, he was not necessarily transferred but, rather, transformed to be a resident of Precinct 1. In the general election, he was able to vote for Justice of the Peace in Precinct 1, Place 2, which always had been in Precinct 1, and he was also able to vote for Justice of the Peace, Precinct 1, Place 3. He testified that had he had the opportunity to seek the nomination for Precinct 1, Place 2, for whom he voted in the general election, he would have sought that office because it was held by a political novice. (Tr. 51-52).

While his political interests are not at issue, his testimony points out that the practice of how party nominees were selected to seek the office of Justice of the Peace was changed from a primary election to a political party precinct convention. That change was never submitted to the Attorney General of the United States for preclearance, which change was the result of Bexar County's interruption and dismantling of the continuum of the election process. As a result of such change, the Democratic Party of Bexar County instituted without preclearance the standard to determine a majority vote of precinct chair electors to select the party nominee from "**authorized**" (one more than half of the precinct chairs from precincts where a chair **could have been** elected) to "**actual**" (one more than half of the **actually** elected precinct chairs).

**B. Scope of Section 5 of the Voting Rights Act**

The United States Supreme Court has succinctly stated the standard Bexar County was required to follow:

> A jurisdiction subject to §5's requirements must obtain either judicial or administrative preclearance before implementing a voting change. No new voting practice is enforceable unless the covered jurisdiction has succeeded in obtaining preclearance. [citations omitted] If a voting change subject to Section 5 has not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting implementation of the change. . . .

**Lopez v. Monterey County,** 519 U.S. 9, 20 (1996)

1. The Election Plan Was Never Precleared

The court below claims that the preclearing of the redistricting of Bexar County Justice of the Peace and Constable Precincts 1 and 5 also precleared the voting practice at issue because it stated in its submission that the change in voting procedure would be effective on January 1, 2002, or upon preclearance (App 11a). In fact, it was not effective until June 11, 2002, when the Precinct 5 Constable's office was dismantled. **McCain v. Lybrand,** 465 U.S. 236, 251, 257 (1984) made clear that submission of legislation [here, the Bexar County Commissioners Court Order of August 28, 2001,] for administrative preclearance under Section 5 defines the scope of the preclearance request. The submission pertains only to the changes that are

identified and proposed by that order. Here, Bexar County never identified the change in the ongoing voting process. **Young v. Fordice,** 520 U.S. 273, 290 (1997) demonstrates that DOJ's "not interpose any objection" letter to one plan does not "approve" consequences of the plan not explicitly pointed out. *Id. at* 286-90.

Any ambiguity in the scope of a preclearance request must be resolved against the submitting authority. In **Clark v. Roemer,** 500 U.S. 646, 654 (1991), the United States Supreme Court reversed a district court which allowed an illegal election to be held because the change in voting had not been precleared. In **Clark,** in response to black registered voters' Section 5 allegations, the State of Louisiana submitted all of the unprecleared voting changes for administrative preclearance. The United States Attorney General granted preclearance for some of the changes but not others. A single judge district court, presiding over the Section 2, case enjoined the state from holding elections in eleven judicial districts which it determined violated Section 2. (42 U.S.C. 1973). Some of those judicial districts were also at issue in the Section 5 portion of the case. A three-judge court, presiding over the Section 5 case, denied the voters' motion to enjoin the state from holding elections for the seats **not blocked** by the Section 2 injunction. The Supreme Court reversed, *citing* **McCain v. Lybrand,** 465 U.S. at 255, n.26, and explained that Section 5 *focuses entirely on changes* in election practices, so that submission of a particular change does not encompass all other changes. **Clark v. Roemer,** 500 U.S. at 656.

A request for preclearance of certain identified changes in election practices which fails to identify other practices as new ones thus cannot be considered

an adequate submission of the later practices. **McCain v. Lybrand,** 465 U.S. at 256-57, *cited* in **Clark v. Roemer,** 500 U.S. at 658. Therefore, the ruling below that the Attorney General precleared the voting practices at issue by preclearing redistricting is unsupported either in law or in fact.

Three decades ago the Supreme Court made it clear that the Voting Rights Act must be given the broadest possible scope to reach any [county] enactment which altered the election law of a covered State in even a minor way. **Perkins v. Matthews,** 400 U.S. 379, 387 (1971). As will be demonstrated below, Bexar County has implemented an unprecleared change in voting in violation of both Texas law and the Voting Rights Act of 1965.

2. The Justice Of The Peace Elections Were Illegal Elections

Bexar County's preclearance submission letter (November 27, 2001) to the Department of Justice did not request a change in a voting standard, practice or procedure whereby a primary election is held under one plan of voters and boundaries and a general election is to be held under a different plan of voters and boundaries. Such unprecleared election has been held illegal. **Terrazas v. Slagle,** 821 F. Supp. 1154, 1159 (W.D. Tex. 1992) (three-judge court). The unprecleared election, thus, is a voting change that is not enforceable. **Clark v. Roemer,** 500 U.S. at 652 (A voting change in a covered jurisdiction will not be effective as la[w] until and unless cleared) *quoting*, **Connor v. Waller,** 421 U.S. 656 (1975)). The **Clark** court continued, "Failure to obtain either judicial or administrative preclearance renders the change enforceable." *Ibid.* (quoting **Hathorn v. Lovorn,** 457 U.S. 255, 269 (1982)). Where

selecting an important county officer change from elected to appointed, such change must pass preclearance scrutiny. **Allen v. State Board of Elections,** 393 U.S. at 569-70. Herein, should not the change in selecting candidates for such office be subjected to the same scrutiny?

The aforesaid request for redistricting preclearance, failing to identify the instant later voting practices referenced above, cannot be considered an adequate submission of the later practices. **McCain v. Lybrand,** 465 U.S. 236, 256-57 (1984). In **Clark,** the Supreme Court held that, where a district court is faced with the *ex ante* question whether to allow an illegal election to be held at all, § 5's prohibition against implementation of unprecleared changes **required** the District Court to enjoin the election, *Id.* at 654, which the single judge court below refused to do. (Docket Entry No. 94).

The proposed election is illegal under the Texas Election Code. There is no provision in the Code to authorize the standard, practice or procedure utilized by Appellee. Section 202.006 is inapplicable because the vacancy did not occur after the 65th day before the primary election day. A primary is an election. **Love v. Foster,** 522 U.S. 67, 71n. 2, citing **United States v. Classic,** 313 U.S. 299, 320 (1941). The Justice of the Peace Precinct 1, Place 3, general election is not for an office for which no previous election has been held, TEX. ELEC. CODE § 202.003, in that a primary election for that office was held on March 12, 2002 when it was designated Precinct 5, as a matter of substance over form.

3. Implementation

Bexar County could not conduct any activities in preparation for the general election on November 5, 2002, absent preclearance of the voting scheme at issue, without violating the Voting Rights Act. **State of South Carolina v. Unites States,** 585 F. Supp. 418, 421 (D.D.C. 1984) (three-judge court)(steps taken by government *in preparation for* the [general election] constitutes implementation of an unprecleared voting change)citing **Georgia v. United States,** 411 U.S. 526 (1973); **Perkins v. Matthews,** *supra.*; **Allen v. State Board of Elections,** *supra.*). Implementation begins, specifically, with candidate qualification filing. **Busbee v. Smith,** 549 F. Supp. 494, 497 n.1 (D.D.C. 1982) (three-judge court), *aff'd* 459 U.S.1166 (1983). Without question, candidates did attempt to qualify for the general election in Justice of the Peace Precinct 1, Place 2 and Place 3. Petitioning for candidate qualification is implementation of a voting change. **Puerto Rican Legal Defense and Education Fund, Inc. v. City of New York**, 769 F.Supp. 74, 76 (E.D.N.Y. 1991).

4. Bexar County Created The Problem

As soon as the 2000 Census was made available to the Bexar County Commissioners Court, it knew that it was required to redistrict the Commissioners Precincts in order to comply with the one person one vote rule. **Avery v. Midland County, Texas,** 390 U.S. 474 (1967). Although the redistricting plan was adopted on August 28, 2001, it was not submitted to the United States Department of Justice until approximately December 3, 2001, the date that candidates began filing for positions in the state-sponsored political primary elections.

The members of the Bexar County Commissioners Court, as the governmental representatives of Bexar County's governing body, should have known that the entire election system introduced to the United States Department of Justice was subject to preclearance, including how the elections were to be conducted if and when the redistricting plan was precleared. **City of Lockhart v. United States,** 460 U.S. 125, 131-32 (1983)("We therefore hold that entire system introduced in the 1973 charter is subject to preclearance."). Bexar County's delay in its initial submission and its further delay in failing to timely respond to the questions raised by the Department of Justice caused it to be placed in the unprecleared predicament it faced. As stated by the United States Supreme Court in **N.A.A.C.P. v. Hampton County Election Commission,** 470 U.S. 166, 180 (1985):

> To the extent that the appellees found themselves in a dilemma, however, it was largely of their making. Rather than submitting Act No. 549 shortly after its passage, which would have allowed ample time for preclearance before the scheduled opening of the filing period, the State delayed this action for two months. . . .

To the same effect is **State of South Carolina v. United States,** 585 F. Supp. at 423, wherein the court stated:

> Considering the relative culpability of the parties for any delay in assuring the lawfulness of South Carolina's State senatorial elections in 1984, the Court finds that the burden, indeed, falls on the

> State. *See* **Perkins v. Matthews,** 400 U.S. at 396, 91 S. Ct. at 440. It knew as early as March, 1981, when it received the 1980 Decennial Census Data that it would need to reapportion its Senate. . . .

Herein, Bexar County delayed **three** (3) months, not two (2), from September to December 2001, to begin to seek preclearance of the redistricting changes. The County only began to comply with the law after Appellants filed this action and secured a temporary restraining order on November 21, 2001, prohibiting Appellees from implementing the changes. The County had to know it would have to seek preclearance of the election process if the Attorney General precleared its redistricting plan because the Honorable William Wayne Justice, in denying the County's motion to dismiss, ordered Bexar County to conduct the Justice of the Peace primary election pursuant to the existing plan, placing the now-Precinct 1, Place3 Justice of the Peace in Precinct 5 to run for election. Saul Acevedo's primary election in Precinct 1, Place 2, was unaffected.

5. Change Covered By Section 5 Of The Voting Rights Act

The change in a voting standard, practice or procedure (42 U.S.C. § 1973) from a primary election in Precinct 5 to a general election in Precinct 1, the two being different geographic areas with different populations, is a change in voting covered by Section 5 of the Voting Rights Act. All changes no matter how small are subject to § 5 preclearance scrutiny. **Young v. Fordice,** 520 U.S. at 284; **Allen v. State Board of Elections,** 393 U.S. at 568. For over 62 years, the law of the land has been that a primary election involves a necessary step in the choice of candidates for election

to both federal and state offices, and where the primary election controls that choice for the election as with the election of the Justice of the Peace in question, because the Democratic Party nominee was not challenged by a Republican or any other party opponent, the primary is an election. Thus, the voters' choice of the candidate in the Democratic Party Primary determines the choice of the elected official and is an election. **United States v. Classic,** 313 U.S. at 319-20 (1941). *See also* **Foster v. Love,** 522 U.S. at 71 (1997), *reaffirming* **United States v. Classic,** that an election includes any primary election which involves a necessary step in the choice of candidates for election.

Two cases from the federal courts of the State of Texas have emphasized the importance of a primary election as part of the continuum of the election process. In **Lopez v. Hale County, Texas,** 797 F. Supp. 547, 548 (N.D. Tex. 1992)(three-judge court), the Commissioners Court of Hale County approved the final plan of reapportionment on October 23, 1991 and immediately submitted the plan to the Attorney General of the United States for preclearance. The candidate filing deadline for the primary elections was January 2, 2002, and the primary elections were held on March 10, 1992. The Attorney General on April 10, 1992 indicated his unwillingness to preclear the redistricting plan. Lopez filed his complaint on April 23, 1992, requesting that the November 3, 1992, general election be enjoined until the county adopted a reapportionment plan in compliance with Section 5 and that the March 10, 1992, primary elections be declared void. The three-judge court refused to enjoin the general election or declare the primary elections void because the plaintiff filed his law suit six weeks after the primary election.

The importance of the primary election was explained, as follows:

> Here, the primary, once conducted on March 10, created expectation interests that cannot likely be discounted. The overriding purpose of the act is to facilitate citizens right to participate in the electoral process. . . .
>
> * * *
>
> . . . [A]n election has been held; voters have cast their ballots; candidates have been nominated; the County has expended considerable money and effort in that process. It would be particularly onerous to avoid that process and start over, unless overriding equitable considerations required it.

**Lopez v. Hale County,** 797 F. Supp. at 550-51.

It would be equally unfair to require the candidates nominated according to the boundaries used in the primary to run in new districts in the general election. The parties have indicated that the boundaries under their newly-presented stipulated plan are significantly different from those used in the primary. Such chaos benefits no one and, most importantly, hardly advances the interests of representative democracy.

In this case, the primary election was held within Precinct 5. Voters cast their ballots. Judge Zaragoza was nominated. The county expended considerable money and effort in that process, and there was no

sound reason to void the process. Not only is a change in boundaries unfair to the candidate, but also it is unfair to the voters because one group of voters nominated the candidate, and another group elected him from expanded boundaries. Moreover, residents of then-Precinct 5 could have sought to be nominated or to vote for Justice of the Peace, Precinct 1, Place 2, which primary election also was conducted. The same problem existed there.

All of this chaos could have been avoided if Bexar County either timely filed its application or recognized the possibility of a delay in preclearance. It should have implemented the change in voting for the 2004 election process. The 2002 election process had begun with candidate filing on December 3, 2001, the time Bexar County first sought preclearance. **Terrazas v. Slagle,** 821 F.Supp. 1154 (W.D. Tex. 1992) (three-judge court), completely supports the Appellants' position and need for preclearance herein. Before considering the facts and the holding, please consider the court's description of the relationship between the primary and general elections in Texas, as follows:

> Texas law and practice has consistently been that at the general election for state offices the nominees of the respective political parties are those nominated at the preceding party primary elections. Texas Election Code §§ 161.008,172.001. Primary elections for offices chosen by the electorate in separate geographical districts obviously make no sense unless the districts are the same for the ensuing general election as for the primary, and we must presume that this was the

> intendment of the Texas law. We agree with the Justice Department's undisputed assertion that `To our knowledge, the State of Texas has never held or sought to hold a general election under a redistricting plan different from the plan used for the preceding primary election.' Because the Secretary of State's August 6 directive makes this vast departure from settled Texas law and practice, it is clearly a change for purposes of Section 5.

**Terrazas v. Slagle,** 821 F.Supp. at 1159.

Just as in **Terrazas v. Slagle,** 821 F.Supp. at 1160 where there was no statutory language that purported to authorize the choosing of party nominees by primaries in districts different from those to be used in the general election, the same is true as to the precleared redistricting plan submitted by Bexar County to the Department of Justice. Nowhere in that plan was the change in voting practice that the party nominees would be chosen by primaries in districts different from those to be used in the general election. That was one of the main reasons, if not the main reason, why the court in **Terrazas** enjoined the implementing or complying with the Secretary of State's directive and ordered that the 1992 Texas Senate general elections be held according to and utilizing the senate districts that were the same as those utilized in the primary. *Id.* at 1162

Finally, the **Terrazas** Court explained in clear and concise reasoning:

> In common and universal usage the words primary elections, with respect to offices filled by election from diverse geographically defined single member districts, mean elections in which will be chosen the party nominees for the next general election in the **same district as that in which the primary election takes place**. (emphasis added).

*Id.* at 1161. The lower court herein failed to consider this opinion. In **Terrazas**, the State of Texas argued that the court order applied only to the primary and was not intended to extend to the general election, which is precisely the reasoning of the court below. The court disagreed and construed its order to cover the entire 1992 election process. As in **Terrazas**, the **entire election process** herein should have been submitted to the Attorney General for preclearance.

**II.** The court below failed to consider the issue presented, confusing the standard to establish a "quorum" to conduct business with a "majority" of members to fill a vacancy, and Appellants introduced sufficient evidence that the Bexar County Democratic Party changed its standard to determine a majority to nominate candidates to fill a vacancy from "authorized"members in 1972 to "actual" members of Justice of the Peace and Constable Precinct 1 in 2002 without preclearance of the change in such voting standard, practice or procedure.

### A. The Voting Standard in 1972

Appellants presented proof of the voting practices and procedures used in filling vacancies by the Democratic Party in Bexar County between 1972 and

1982. Joyce Peters was the only witness who testified as to the standard used by the Bexar County Democratic Party in 1972 to determine a majority vote to fill a vacancy on the Bexar County Party Executive Committee (hereinafter "the Executive Committee") or to fill a vacancy as a party candidate for an office on the general election ballot. She stated that she was elected in 1972 by the Executive Committee to fill a vacancy to become a precinct committeeperson. In 1973, she was elected to fill a vacancy as Chair of the Executive Committee, in which position she served until 1982. In response to Appellants' counsel's question as to the standard to determine a majority by the Executive Committee in 1972, Ms. Peters testified that nominees for vacancies in office were filled by a vote of a majority of those precincts "where you could possibly elect or have a committee member."[6] (App. 21a ).

---

[6] On direct examination, Ms. Peters testified:

Tr., p.68, ll. 20-25; p.69, l. 1 and ll. 16-22; p.70, ll. 4-15

p.68

Q My simple question is : Before you became a member of the executive committee, did you observe the voting practices to elect persons to fill your own vacancy and other vacancies, whether it was for precinct committee persons or to fill a vacancy to nominate someone to be the party nominee for, let's say, justice of the peace or constable or other office?

p.69

A Yes.

A . . . [I]n order to elect, you had to have a majority. A quorum is one thing and a majority is another.

When cross examined by Appellees' counsel, Ms. Peters reiterated the 1972 standard she had described in her direct testimony.[7] When questioned by the Circuit Court Judge on the panel, Hon. Fortuno Benavides, Ms. Peters' testimony regarding the 1972 standard used by

---

| | | |
|---|---|---|
| 19 | Q | . . . A majority of what? |
| 20 | A | . . . [T]he rule of thumb was always that |
| 21 | | we had a majority of those precincts where you could possibly |
| 22 | | elect or have a committee member. |
| p.70 | | |
| 4 | Q | And did you have access to determine what precincts |
| 5 | | actually were populated? |
| 6 | A | Well, of course. We ran the election. |
| 7 | Q | Okay. |
| 8 | A | It is our election. |
| 9 | Q | Now, how long did you serve on the Bexar County Democratic |
| 10 | | Executive Committee? |
| 11 | A | About two years. |
| 12 | Q | And then after that, what position did you hold? |
| 13 | A | Chairman. |
| 14 | Q | Until when? |
| 15 | A | 1982. |

[7] Ms. Peters' responses to cross examination:

Tr., p.72, ll. 15-22

| | | |
|---|---|---|
| p.72 | | |
| 15 | Q | All right. You have to have a majority of the people |
| 16 | | voting in order to elect, correct? |
| 17 | A | You have to have a majority of the number of possible |
| 18 | | precincts that could elect. |
| 19 | Q | In order to elect – – |
| 20 | A | Right. To be downright legal, to make absolutely certain |
| 21 | | you are not going to end up in court, you better have 50 |
| 22 | | percent of those who possibly could be elected. |

the Bexar County Democratic Party remained stalwart: that is, the "majority" vote to fill a vacancy was determined from the number of **authorized** precinct chairs, not the actual precinct chairs as used in 2002.[8]

### B. The Voting Standard in 2002

Joann Ramon, a Bexar County witness, testified that between 1988-2002, the standard to determine a majority for any Executive Committee vote, including

---

[8] To Judge Benavides, Ms. Peters explained:

Tr. p.73, l. 25; p.74, ll. 1-18

p.73
25 Q And I am not trying to put words in
p.74
1 your mouth. You know a lot more about this than I do.
2 Did you come upon an occasion or was it common where
3 you were going to have a committee vote on a nomination or
4 something like that, and there wasn't a precinct chair from a
5 particular election precinct? In other words, there was no
6 one there at that – –
7 A Oh, sure.
8 Q Okay. And in those instances in
9 which there was no one there, what would you do?
10 A You count that precinct.
11 Q You count that precinct?
12 A Yes, if it is inhabited. If the
13 precinct is the middle of an – –
14 Q Even though you don't have a
15 precinct chairman there?
16 A – – airport, yeah, you don't count that.
17 It is where you possibly, where there could possibly be a
18 committee member elected.

the Justice of the Peace and Constable Precinct 1 election on July 25, 2002, was a majority of actual members of the Bexar County Executive Committee.[9] "Actual members" were chairs of precincts that had actually elected precinct chairs.

---

[9] Tr., p.94, ll. 18-25; p.95, ll.1-2; p.101, ll.19-25; and, p.102, ll. 1-3

p. 94

| | | |
|---|---|---|
| 18 | Q | . . . Are you |
| 19 | | familiar with the process by which the Democratic Party in |
| 20 | | Bexar County has nominated persons to fill vacancies when |
| 21 | | vacancies have arisen? |
| 22 | A | Yes. |
| 23 | Q | What is that process? Can you describe it briefly for me? |
| 24 | A | What we do is we take the number of chairs that are |
| 25 | | seated, and we must have a simple majority of those chairs |

p. 95

| | | |
|---|---|---|
| 1 | | present in order to fill a vacancy in the nomination for a |
| 2 | | party. |

p. 101

| | | |
|---|---|---|
| 19 | Q | . . . [W]hat you are telling the Court is, regardless of what |
| 20 | | the procedure was that was followed in 19722 and thereabouts, |
| 21 | | the procedure that is followed today . . . |
| 22 | | in 2002, as best you understand it, is that you determine the |
| 23 | | majority by utilizing the actual number of seated committee |
| 24 | | persons as the total number? |
| 25 | A | Yes, sir. |

p. 102

| | | |
|---|---|---|
| 1 | Q | And then you take one over half to be a majority? |
| 2 | A | Exactly. |

### C. A Quorum Was Never the Issue

The majority below, as identified by the dissenting opinion, confused Appellants' claim to be that relating to the standard to determine a quorum to conduct business. As ably shown by the dissenting opinion, the claim was a change in the standard to determine a majority to elect, not a quorum to conduct business. The issue of a "quorum" never came up because "[i]f there were enough votes to constitute a majority of the authorized members, there was no need for an independent determination of the existence of a quorum. Ms. Peters' testimony establishes that the practice of determining a majority vote changed between 1972 and 2002." (App. 23a ).

The dissenting opinion in great detail demonstrates that Appellants' evidence establishing the change in the standard was completely unrebutted. In fact, Appellants' evidence was bolstered by the testimony of Joann Ramon, the Appellees' witness. Because the Court misidentified the question presented, it found that Appellants failed to present sufficient evidence of a change in standard to establish a "quorum," which was never the issue. The standard to determine a majority was changed. That standard was required to be precleared. It was not. Minor as well as major changes require preclearance. **Young v. Fordice,** 520 U.S. at 284 (citations omitted).

## D. Secretary of State Opinion Letters

Appellants presented two opinion letters from the offices of two Secretaries of State.[10] One letter, dated February 8, 1994, was written to Jan Sumrall, Administrator for the El Paso County Republican Party from John Hannah, then Secretary of State. In the letter, he informed Ms. Sumerall that:

> The question you are posing is: What is the number of a county executive committee, as that body is defined by section171.002(a)? Put another away (sic), is the "number of members [of a county executive committee] fixed by statute" the authorized full membership (i.e., the county chair and all precinct chairs) or the actual extant membership. . . .[Y]ou are advised that the membership of a county executive committee consists of its actual members as opposed to its authorized membership.

Appellants' Ex. 18, Hannah Letter, pp. 2 and 4. *See also* (App. 23a ).

However, Secretary Hannah closed his letter advising Ms. Sumerall that the legislature had made no changes in sections of the election code pertaining to district or precinct chairs, "[therefore, the membership of party district and **precinct executive committees**

---

[10] The Secretary of State, the chief election officer in the State of Texas, is charged with establishing uniformity of election laws and procedures and has the authority to establish rules under which elections, including political party elections, are conducted. TEX. ELEC. CODE §§ 31.001 and 31.003. (App. 40a).

continue[] to be comprised of their **authorized** membership. *Id.* at p. 4. (App. 24a).[11]

The second letter was addressed to Gabe Quintanilla, Chair, Bexar County Democratic Party from Ann McGeehan, Director of Elections, Office of the Secretary of State. The letter was dated July 31, 2002.[12] In the letter, Ms. McGeehan informed Mr. Quintanilla that the "Sumerall letter" remained an appropriate interpretation of the membership of the county executive committee. However, Ms. McGeehan informed Mr. Quintanilla that her office had **reconsidered** the position in the "Sumerall letter" and attempted to override that letter when determining that: ". . . the requirement for a **precinct executive committee** to be based on ***actual*** membership, so long as the number in not fewer than three." Appellants' Ex. 19, McGeehan Letter, p. 1(emphasis added). However, Ms. McGeehan also warned that rules for political party functions are subject to review by the U. S. Department of Justice. *Id.* at p.2. (App. 25a ).

## CONCLUSION

For the foregoing reasons, this court should note probable jurisdiction and set the case for argument.

---

[11] The letter from Secretary Hannah was written 21 years after the Voting Rights Act applied to Texas.

[12] The date of the letter was five (5) days after the Bexar County Democratic Party Precinct Executive Committee elected its nominee to Justice of the Peace, Precinct 1, Place 3, and during this litigation

Respectfully submitted,

JUDITH SANDERS-CASTRO
SBN: 17595255
9122 Autumn Skies
San Antonio, TX 78254

LES MENDELSOHN &
ASSOCIATES, P.C.
110 Broadway, Suite 500
San Antonio, TX 78205
(210) 222-2271 [telephone]
(210) 230-8914 [facsimile]

By:
LESLIE STEPHEN
MENDELSOHN
SBN: 139310000

ATTORNEYS FOR
APPELLANTS

Civil Action Number
SA-01-CA-1049-WWJ

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SERGIO J. RODRIGUEZ, et al.
Plaintiffs,

v.

BEXAR COUNTY, TEXAS,
Defendants.

OPINION

Before BENAVIDES, Circuit Judge, JUSTICE and PRADO, District
Judges.

BENAVIDES, Circuit Judge:

Plaintiffs Sergio Rodriguez *et alia* have initiated the cause before us pursuant to 42 U.S.C. § 1973 alleging that Defendants implemented voting practices or procedures which required but did not receive preclearance pursuant § 5 to the Voting Rights Act. 42 U.S.C. § 1973c. We disagree and find in favor of the Defendants on both counts.

I.

On August 28, 2001, the Commissioners Court, as the governing legislative body of Bexar County, Texas, issued an order adopting a plan for redistricting election

districts for the election of County Commissioners, as well as a plan for redistricting election precincts for the election of Justices of the Peace and Constables.[1] The redistricting initiative was prompted by data recovered from the 2000 Census which revealed that a population deviation of 22.5% existed between the most populous and the least populous districts in Bexar County.[2] Consequently, the Commissioners Court commenced a redistricting project aimed at redressing the population inequities. With respect to the § 5 issues at bar, the portion of the plan that is relevant here concerns the redistricting of the Justices of the Peace and Constable precincts (Justice Precincts).

*A. The Plan*

Prior to the plan, there were five Justice Precincts in Bexar County. The plan stipulated that Justice Precinct 5 would be abolished, and Justice Precincts 1-4 would be such that the area which was previously Justice Precinct 5 would be incorporated into Justice Precinct 1. Prior to the plan, Justice Precinct 5

---

[1] The Commissioners Court is comprised of five members; four commissioners each elected from a single member district, and the county judge, who serves as the presiding officer. Tex. Const. Art. V, §18.

[2] The 2000 Census data indicated that Bexar County had experienced a population growth between 1990 and 2000 censuses. In particular, the Hispanic population in Bexar County grew by 28.4%, which represented 81% of the total population in Bexar County between 1990 and 2000. In contrast, the Anglo population in Bexar County experienced no statistically significant population increase during the same time period. (An increase in the African American population accounted for 5.5% of the total growth in the county, and "Other" accounted for the remaining 12% of growth.).

carried the following two elected positions: one Constable and one Justice of the Peace. In abolishing Precinct 5, the Constable and Justice of the Peace positions from Justice Precinct 5 were eliminated. The August 28, 2001 order of the Commissioners Court stipulated that the redistricting plan was to go into effect January 1, 2002.[3] The order further stipulated that the plan would be submitted for preclearance September 5, 2001. It was not.

On November 19, 2001, Plaintiffs initiated this § 5 enforcement action asserting that preclearance of the plan was required, but that it had neither been sought nor received by the County. On November 30, 2001, the County submitted the plan to the Department of Justice for preclearance.[4] By order of this court, this action was abated on April 3, 2002 pending preclearance.

B. *The Primary*

On March 12, 2002, Bexar County held its regularly scheduled primary elections under the old plan, as the new plan had not yet received preclearance. Thus, Justice Precinct 5 held a primary on March 12, 2002, for the positions of Justice of the Peace and

---

[3] The plan order was issued August 28, 2001, and ratified by an order dated September 5, 2001.

[4] On November 20, 2001, the court issued a TRO enjoining the County from implementing the plan for 10 days, which was renewed for another ten days. The County submitted the plan to the DOJ on November 10, 2001, and Plaintiffs sought another injunction pending preclearance. The County, however, amended the implementation order to stipulate that the plan would be effective the earlier of January 1, 2002 or when preclearance is obtained.

Constable. No Republican candidates stood for office in the Justice Precinct 5 primary. The democratic electorate nominated Justice Zaragoza for the position of Justice of the Peace of Justice Precinct 5.

C. *The Preclearance*

On May 15, 2002, the DOJ precleared the redistricting plan. On May 18, 2002, Bexar County announced its intention to hold the general election in accordance with the newly precleared redistricting plan rather than the old plan which was in place at the time of the primary. Bexar County assumed the position, which is supported in the language of the plan itself, that the redistricting plan: (a) abolished Justice Precinct 5 altogether; (b) expanded the geographic territory of Justice Precinct 1; and (c) created a new Justice of the Peace judgeship in Justice Precinct 1, place 3. Thus, in the County's view, the primary results from Justice Precinct 5 were invalidated by the abolition of that precinct and a new Justice of the Peace position in Justice Precinct 1, place 3 was created. Because that office was created before September 1, 2002 (the 65th day before the general election), but after January 9, 2002 (the 62nd Day before the primary), the first occupant was to be elected at the 2002 general election from nominees, chosen by the Democratic and Republican Parties' precinct executive committees.[5]

The Republican Party did not select a candidate to stand for the new Justice of the Peace office, but the Democratic Party precinct executive committee

---

[5] *See* Tex. Elec. Code, §§ 202.002 (a), 202.003 (a), 202.006 (a) (1).

members conducted a nominating vote, permitting a majority off the actual executive committee members to nominate a candidate for the newly created judgeship.[6] Those members nominated Justice Zaragoza to stand for election for Justice of the Peace in Justice Precinct 1, place 3.

In response to the County's plan to conduct the general election under the new redistricting plan, Plaintiffs amended their complaint asserting *inter alia* that implementing the plan between the primary and the general election constituted a change in and of itself, and that as such, the timing of the implementation of the plan required preclearance. Plaintiffs further argued that the method by which the Democratic Executive Committee selected Justice Zaragoza for nomination to the newly created judgeship was a deviation from previous practice, and as such was subject to § 5. Consequently, in their Fifth Amended Complaint Plaintiffs sought a TRO enjoining the general election, or at least the Precinct 1, place 3 Justice of the Peace

---

[6] At the meeting at which Justice Zaragosa was nominated, the total number of actual committee chairs was used to determine whether a quorum was present, as opposed to the number of executive committee chairs which the party is authorized to have under Texas law. *See* Tex. Elec. Code § 42.005 (providing that no single precinct contain more than one of each of the seven different types of election districts - a scheme which results, in some instances, in very small or sparingly populated precincts). In some instances authorized chairs remain unfilled for a number of reasons, including a lack of registered voters residing in the precinct. *See e.g.*, Tex. Elec. Code. § 42.010 (relating to precincts with between zero and six registered voters). Therefore, the actual number of executive committee chairs may be lower than the number authorized, and such was the case for the Democratic Party during the time period relevant here.

election pending preclearance by the DOJ of the two putative changes.

On September 30, 2002, a TRO hearing was conducted by the district court, The court denied Plaintiffs' motion for a TRO enjoining the general election under the redistricting plan. The court found Plaintiffs failed to meet their burden of showing irreparable harm.

D. *The General Election*

On November 5, 2002, the County conducted its general election under the redistricting plan. Justice Zaragoza, running unopposed was elected Justice of the Peace for Precinct 1, place 3. There were no elections held for offices in the abolished Justice Precinct 5. An order was subsequently issued by this court to proceed with a trial on the merits for Plaintiffs' § 5 claims. Accordingly, on December 16, 2002, a trial was conducted by this court on the merits of Plaintiffs' § 5 claims, the resolution of which is now before the court.

II.

This three-judge panel has limited jurisdiction over Plaintiffs' § 5 claims. *City of Lockhart v. United States*, 460 U.S. 125 (1983). In general, a three-judge panel convened pursuant to 28 U.S.C. § 2284 to consider claims arising under § 5 of the Voting Rights Act may only consider: (1) Whether the change identified is covered by § 5; (2) Whether, if the change is covered, the requirements of § 5 have been met; and (3) What the appropriate remedy is if the requirements of § 5 have not been met. *Id.* at 129, n. 3. *Lopez v. Monterey Co. Cal.*, 519 U.S. 9, 23 (1996). Thus, here, our question is

limited to "the determination [of] whether a voting [change] is covered by §5, but has not been subjected to the required federal scrutiny." *Smith v. Clark*, 189 F.Supp. 2d 529, 534 (S.D.Miss. 2002) (quoting *United States v. Board of Supervisors of Warren County, Miss.*, 429 U.S. 642, 645-46 (internal quotation marks and citations omitted).

Section 5 of the Voting Rights Act, applies to "any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting." 42 U.S.C. § 1973 (c). Under the Act, the term "voting" includes, *inter alia*, "all action necessary to make a vote effective in any primary." 42 U.S.C. § 1973 § (c)(1). Moreover, to determine whether a practice or procedure constitutes a "change" the court looks to whether the practice was in place on November 1, 1972, the date on which Texas became subject to § 5 scrutiny. *City of Lockhart v. United States*, 460 U.S. at 132.

Here, Plaintiffs identify two "changes" which they contend required, but did not receive, preclearance by the Department of Justice. First, Plaintiffs assert that although the DOJ precleared Bexar County's redistricting plan, the preclearance did not extend to the *timing* of the plan's implementation, and because the timing of the implementation had an independent impact of the election, it required express and particular authorization by DOJ. Second, Plaintiffs assert that the method by which the Democratic Party executive committee selected Judge Zaragoza was a departure from the procedure which was in place on the date which serves as the benchmark in Texas for the purposes of the Voting Rights Act. We consider each of these claims in turn below.

A. *Timing*

First Plaintiffs assert that the DOJ did not preclear Bexar County's decision to implement the redistricting plan - which was itself undisputedly precleared - between the primary and the general election.[7] The timing of the implementation is significant, in Plaintiffs' view, because under the plan the Justice of the Peace position from Justice Precinct 5 was reassigned to Justice Precinct 1, and consequently Justice Zaragoza stood for election before a different set of voters than the electorate which had nominated him in Justice Precinct 5 primary. Therefore, Plaintiffs conclude, DOJ approval of the timing of the implementation is a matter separate and apart from the DOJ's approval of the plan itself.

As an initial matter, we would point out that Plaintiffs' contention that the timing of the implementation of the plan bore independent consequences seems entirely predicated on Plaintiffs' understanding that the Justice of the Peace position in Precinct 5 was transferred rather than abolished outright. The parties proffer disparate interpretations of whether the redistricting plan abolished the Justice of the Peace position in Precinct 5 all together, and created a new Justice of the Peace position in Precinct 1, or, instead, transferred the Justice of the Peace position from Precinct 5 to Precinct 1. Plaintiffs assert that the

---

[7] With respect to this claim, Plaintiffs also argue that under Texas law, it was illegal to conduct the general election under the redistricting plan. Citing Texas Election Code, § 276.006.Plaintiffs contend that changes in political boundaries may not be made within three months of an election. However, this court has no jurisdiction to consider Plaintiffs' state law claim. *See City of Lockhart*, 460 U.S. 125.

Justice of the Peace position was transferred, an understanding which presumably arises from the fact that the same candidate who was nominated to stand for office in Justice Precinct 5, was, after preclearance, nominated by the Democratic Party executive committee to stand for office in Justice Precinct 1.[8] Plaintiffs conclude, therefore, that the office was transferred from Precinct 5 to Precinct 1, and that a different set of voters would be voting for Justice Zaragoza in the general election than those who voted to nominate him.[9]

Preliminarily, we would be clear that we are not in accord with Plaintiffs' perspective concerning the fate of the Precinct 5 Justice of the Peace office under the redistricting plan. The plan clearly states that Justice Precinct 5 is to be abolished and that a new justice of the peace position will be created in Justice Precinct 1, place 3. The fact that the same candidate was nominated by the Democratic Party for both the defunct

---

[8] In support of this contention Plaintiffs also point to the portion of the plan that stipulates that a sitting Justice of the Peace shall, upon implementation of the plan, assume the seat of Justice of the Peace Precinct 1, place 3 until the next election. However, we are not persuaded that this provision indicates the position is being transferred. As discussed, supra, the plan states that the Precinct 5 Justice of the Peace position is abolished and a new judgeship is established. The fact that the plan includes a proviso for filling the new judgeship in the circumstance in which the plan is implemented outside an election cycle is of no moment.

[9] This is an argument which only has potential impact with respect to legal proscriptive effect of a rule which Plaintiff would have the court here establish, as Judge Zaragosa was the only standing candidate in either Precinct. Moreover, he was standing unopposed both in the Justice Precinct 5 primary and in the general election in Justice Precinct 1.

and newly created judgeships is of no consequence. Thus, it appears to the court that Plaintiffs' contention that the timing of the implementation of the plan is significant such as to warrant construal as an independent voting change under § 5 lacks substance.

More significantly, however, even assuming *arguendo* that Plaintiffs are correct in their understanding that the timing of the implementation of the plan wrought independent consequences, we think it plain that the change complained of here was both properly before DOJ, and was approved. While Plaintiffs correctly assert that a change must be brought to the attention of the Attorney General before he can be said to have considered it under § 5, here, Plaintiffs concede that the plan which was presented to the DOJ was expressly scheduled to become effective upon preclearance, and the DOJ granted preclearance on a date which fell between the primary and the general election.[10] Thus, to embrace Plaintiffs' construction of

---

[10] Plaintiffs rely on *McCain v. Lybrand*, 465 U.S. 236 (1984), and *Clark v. Roemer*, 500 U.S. 646 (1991), but these cases are both distinguishable from the case at bar. In *McCain*, the court held that a piece of legislation which constituted a change under § 5 had not been "submitted" to the Attorney General where the Attorney general had only been made aware of the law, but had not been specifically asked to preclear it. The court noted that "even when the Attorney General affirmatively states he has no objection, ambiguity may be present if the State's submission itself is ambiguous." *Id.* at 247. The court found that, "the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." *Id.* at 249 (quoting *United States v. Sheffield Board of Commissioners*, 435 U.S. 110 (1978)). Similarly, in *Clark*, the court held the Attorney General's preclearance of statutory amendments which changed the number of judges in particular judicial districts did not constitute

this issue, we must assume that in passing on Defendants' petition for preclearance of the redistricting plan, the DOJ either failed to comprehend or to notice that the plan was slated for implementation upon preclearance, and that by May 15, 2001, the date of preclearance, Bexar County had conducted a primary but not yet held the attendant general election. We cannot adopt such a view. Absent a reason to imagine otherwise, it is appropriate to presume that the DOJ contemplated those material aspects and elements of the plan which were *expressly* before it, and, here, the timing of the implementation of the plan was among the aspects of the plan explicitly presented in the County's petition. Therefore, we find that the requirements of § 5 have been met with respect to this claim.

B. *Actual versus Authorized Committee Members*

The second change which Plaintiffs identify concerns the manner in which the Democratic Party executive committee nominated Justice Zaragoza to

---

preclearance of prior voting changes incorporated in a newly amended statute. *Clark v. Roemer*, 500 U.S. 646 (1991).

Here, however, the timing of the implementation of the plan presented to the DOJ for approval is not analogous to an underlying law submitted by inference or incorporation. The timing of the plan is an element of the plan itself. Just as other aspects of the plan comprise the whole (i.e. the drawing of precinct lines, the offices to be established and removed) the date of implementation is an aspect of the actual plan. Thus, here, in contrast to *McCain*, the Attorney General is not assumed to have considered a putative change merely because he was made aware of it, he is assumed to have considered all express and relevant aspects of the plan presented him.

stand for election in the newly created Justice of the Peace position in Precinct 1, place 3. Specifically, Plaintiffs argue that on the baseline date, November 1, 1972, the Democratic Party executive committee nominated candidates for office using a quorum derived from the number of *authorized* committee chairs, rather than the actual number of sitting chairs.[11]

Under § 5, the definition of the terms "standards, practices and procedures" extends to a wide array of voting practices, including seemingly minor practices, insofar as they might be challenged for reducing the potential impact of minority voters. *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). Therefore if the Democratic Party changed its practice from defining a quorum based on the *authorized* number of committee chairs, such a challenge may be covered by § 5 insofar as the change may be challenged for reducing the potential impact of minority voters.

---

[11] No pre trial order was filed with respect to the claims before this three judge court. Defendants submitted a pretrial brief to this court which outlined their position and defenses. Plaintiffs did not submit a pretrial brief to the court, and the relevant portion of their petition, which is found in at ¶ 58 of Plaintiffs' Fifth Amended Complaint, is rather cursory. Specifically, it provides as follows:

> Plaintiffs seek a declaratory judgment that Defendants Bexar County, Texas, Commissioners Court and Bexar County Democratic Party have failed to secure preclearance of changes in the election procedure, that is, for the "actual" as opposed to "authorized" members of the Precinct 1 Executive Committee of the Bexar County Democratic Party Executive Committee to nominate candidates for Justice of the Peace.

Of course, "[o]rdinarily we presume that officials will act in accordance with law," and so in evaluating Plaintiffs' claim that the Democratic Party used a different method by which to define a quorum in 1972, we look first to the relevant law in place at that time. *Perkins v. Matthews*, 400 U.S. 379, 394 (1971). Here, however, the relevant law in place in 1972 does not facially distinguish between authorized and actual committee members, reading instead:

> [A] majority of the members of the committee must participate in making the nomination and all nominations must be made by a majority vote of those members participating in the nomination.

Acts of 1967, 60th Legis., R.S., ch. 723 §47, p. 1913-14. Similarly, the relevant law in place in 2002 does not make an explicit authorized versus actual distinction. *See* Tex. Elec. Code, §§ 171.022, 171.072(a), 171.073.[12]

---

[12] Section 171.022 stipulates that a county executive committee consists of: "a precinct chair from each county election precinct, elected at the general primary by majority vote of the qualified voters of the precinct who vote in the primary on that office . . . or appointed by the county executive committee as provided by this subchapter."

Additionally, § 171.072 (a) further identifies committee membership, providing that, "[t]he precinct executive committee for a . . . justice precinct containing three or more county election precincts consists of the precinct chair of each county election precinct in the . . . justice precinct," and §171.072 states, "[t]he precinct executive committee for a . . . justice precinct containing fewer than three county election precincts consists of the county executive committee, with the county chair serving as chair of the precinct committee."

Nevertheless, an *extra jus* or even illegal practice may be covered by § 5. *See Perkins*, 400 U.S. 379. But where Plaintiffs' complaint stems from an alleged change in practice which itself is neither consistent with, nor required by law, or where, as here, the relevant law is silent or ambiguous as to the requirement, Plaintiffs must demonstrate that the 1972 practice was not just an isolated or occasional aberration, but instead that it constituted a practice administered in a manner sanctioned, albeit indirectly, by the state. *See Miller v. Daniels*, 509 F.Supp. 400, 406 n. 5 (S.D.N.Y. 1981). *See also United States v. Saint Landry Parish School Board*, 601 F.2d 859, 864 (5th Cir. 1979) (passing on the question of whether the contra-legal actions of three poll commissions constituted a practice for the purposes of § 5, and noting, "one would not normally conclude that a state `enacts or administers' a new voting procedure every time a state official deviates from the state's required procedures.")

We conclude on the facts before us that Plaintiffs have failed to make this showing. In support of this claim, Plaintiffs produced testimony from Ms. Joyce Peters, who held the position of the Democratic Party Executive Committee Chair in 1972. Ms. Peters averred that during her tenure a quorum was determined based on the number of precinct chairs the Party was authorized to elect under Texas law. She then described a procedure for determining quorum which fails in all regards to rise to the level of a discernable practice of deriving quorum based on authorized membership: she recalled that prior to the meeting, seats were provided for all authorized precinct chairs. Upon commencement of the meeting, all the seats would be filled, and thus, as Chairman of the Committee, she knew a quorum had been met and well exceeded. When asked whether this

method for determining a quorum was ever confirmed by counting the membership present, Ms. Peters testified that in her recollection the membership was not counted, as quorum had never been challenged.[13]

---

[13] Specifically, Ms. Peters testified to the following:

| | |
|---|---|
| Question: | Do you remember my asking you, or do you remember saying that the method of determining a quorum in 1972 was uncertain? |
| Peters: | It is always uncertain. That is the prerogative of the chair. |
| | . . . |
| Question: | So it is the prerogative of the Chair as to what a quorum is? |
| Peters: | Well, of course, but common sense is going to tell you that a quorum is not the election. You have to have a majority in order to elect. |
| Question: | In determining a quorum, did you look at the number present and say: there are certainly a lot of people here. |

Thus, her testimony established that during the meetings it was apparent to her that more than enough members were present to form a quorum, but her testimony does not establish that this standard was set, in any meaningful way, based on authorized versus

---

That's a quorum? As opposed to counting noses or counting the sign-ins and so forth and determining if it met a particular number that you had determined?

Peters: Quorums are determined generally in the by-rules of organizations. In the Democratic Party, I don't believe at that time we had rules. And, of course, I used Roberts' Rules of Order in determining. And we generally had a full house, and the only people who were seated were committee members. We did not have any guests seated. They were behind the ropes. I would have the meetings in a large hall and we would have stands and ropes to keep people out. I tagged my people. I did – I made every effort possible, and if necessary, we could have gone to a roll call. The question never came up.

actual membership. Moreover, Ms. Peters testified that during her tenure the procedure for establishing a quorum was uncertain and was left to the prerogative of the Chair. Therefore, Ms. Peter's testimony, alone, is not sufficient to establish that a quorum was, in practice, derived based on the number of authorized as opposed to actual members in 1972, and Plaintiffs offer the court nothing further on this point.

In contrast, the Defendants direct the court to two letters in which two different Texas Secretaries of State have interpreted the Texas Election Code with respect to the question of whether a precinct executive committee quorum is determined by actual or authorized membership. The first of these letters, dated February 8, 1994, was authored by then Secretary of State John Hannah. Secretary Hannah's letter opines that § 171.022 authorizes the use of actual rather than authorized membership in determining a quorum in a county executive committee context. The second letter proffered by Defendants is dated July 31, 2002, issues from the office of then Secretary of State Gwyn Shea, and is authored by Ann McGeehan, Director of Elections. McGeehan's letter supports the general opinion offered by Secretary Hannah's letter that actual rather than authorized extant membership is to be used for the purpose of determining quorum.[14] While these

---

[14] McGeehan's letter further qualifies the opinion offered in the earlier letter from the Office of Secretary Hannah, noting that "the precinct executive committee can be based on actual membership rather than authorized membership, so long as the actual membership *is not fewer than three chairs*." Letter of July 31, 2002, from Ann McGeehan, Director of Elections, to Gabe Quintanilla (emphasis added).

letters are not dispositive of the issue, primarily because they specifically address sections of the code which differ slightly from those in place in 1972, the letters nevertheless tend to support the conclusion offered by Defendants that the relevant election code provides for a quorum to be determined by a count of the actual rather than the authorized membership. Moreover, the letters certainly support a conclusion that the relevant code has been interpreted in the manner suggested by Defendants since 1994. Finally, while the letters do not inform the court as to the actual practice in place in 1972, Plaintiffs have failed to demonstrate that the practice differs from the method of determining quorum suggested by the letters, and, of course, the burden here lies with Plaintiffs. We find, therefore, that Plaintiffs have failed to meet their burden with respect to this claim.

III.

To conclude, with respect to the first change identified by Plaintiffs concerning the timing of the implementation of Bexar County's redistricting plan, we find that the DOJ has already precleared it, and

---

We note that the dissent finds within McGeehan's letter the suggestion that the use of actual as opposed to authorized membership is a departure from previous practice. However, the dissent also correctly observes that McGeehan's letter does not state that prior to her letter either the actual practice in place in either 2002, or more relevantly in the benchmark year of 1972, was to use authorized rather than actual membership to determine a quorum, nor does the letter suggest that a change in election law has required a change in practice. Instead, McGeehan's letter merely offers the Secretary of State's interpretation of the practice which is to be used in July of 2002, and that practice is the use of actual as opposed to authorized membership.

consequently the requirements of § 5 have been met. In regard to the second claim by Plaintiffs concerning the manner in which the Democratic Party executive committee nominated Justice Zaragoza, we find that Plaintiffs have failed to demonstrate that the practice which they identify as the relevant benchmark was indeed a practice in place in 1972 for the purposes of § 5 retrogressive analysis. We hold, therefore, that relief cannot be granted to Plaintiffs on the claims presently before us.

SIGNED this 8th day of April, 2003.

Fortunato P. Benavides
United States Circuit Judge

Edward C. Prado
United States District Judge

Civil Action Number
SA-01-CA-1049-WWJ

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SERGIO J. RODRIGUEZ, et al.,
Plaintiffs,

v.

BEXAR COUNTY, TEXAS, et al.,
Defendants.

OPINION

JUSTICE, Senior District Judge (concurring in part and dissenting in part):

Although I agree with Parts I and II-A of the Court's opinion that the requirements of § 5 of the Voting Rights Act have been met with respect to the timing of the implementation of Bexar County's redistricting plan, I do not agree with the Court's conclusions in Parts II-B and III that Plaintiffs failed to demonstrate an unprecleared change in voting procedure for the nomination of candidates for the office of Justice of the Peace. I therefore join Parts I and II-A of the Court's opinion, and write separately to explain my disagreement with Parts II-B and III.

I.

As the Court points out, in order to establish a case under § 5 of the Voting Rights Act, Plaintiffs must

have proved that there has been an unprecleared change in election practice. *See Beer v. United States*, 425 U.S. 130, 138-39 (1976). Specifically, Plaintiffs must have shown that the practice regarding the election of a nominee to fill a vacancy in the office of justice of the peace changed between November 1, 1972 (the benchmark date for purposes of § 5) and July 25, 2002 (the date on which Edmundo Zaragoza was named as the Democratic nominee for the vacancy in the office of Justice of the Peace, Precinct 1, Place 3). *See City of Lockhart v. United States*, 460 U.S. 125, 132 (1983). Plaintiffs allege that the practice in effect in 1972 was to fill such vacancies by a majority vote of those party precincts where there could *possibly be* a committee member ("authorized member"), whereas the practice in effect in 2002 was to fill such vacancies by a majority vote of those *actually* elected as committee members.

The parties do not dispute what the practice was on July 25, 2002. On that date, the Bexar County Democratic Executive Committee of Precinct 1 nominated Edmundo Zaragoza as its candidate for Justice of the Peace, Precinct 1, Place 3, by a majority of the actual, not the authorized, members of the Executive Committee in attendance at the meeting. The parties are not in agreement, however, as to the practice in effect in 1972.

II.

As evidence of the practice in effect in 1972, Plaintiffs produced testimony from Ms. Joyce Peters, who was the Chairman of the Bexar County Democratic Executive Committee from 1972 until 1982. Ms. Peters testified that during her tenure, nominees for vacancies in offices were filled by a vote of "a majority of those

precincts where you could possibly elect or have a committee member." *See* Testimony of Joyce Peters.

In its majority opinion, the Court contends that Ms. Peters "averred that during her tenure a *quorum* was determined based on the number of precinct chairs the Party was authorized to elect under Texas law." Court's Opinion, at 16(emphasis added). This incorrectly states Ms. Peter's testimony. Ms. Peters did not testify that a *quorum* was determined based on the number of authorized precinct chairs, but that a *majority vote* was based on such number. As Ms. Peters testified, "A quorum is one thing and a majority is another." *See* Testimony of Joyce Peters. While it is true Ms. Peters was unable to specify an exact method for determining whether a *quorum* existed, she was persistent in her recollection of the method used for determining a requisite *majority vote* had been taken. A quorum is merely the minimum number of members required to be present at an assembly before it can validly proceed to transact business, whereas a requisite majority vote is the number of votes needed to pass a measure (in this case fill a vacancy) once the quorum is accepted.

This distinction is significant, in that the Court's majority opinion considered Ms. Peters testimony insufficient "to establish that a quorum was, in practice, derived based on the number of authorized as opposed to actual members in 1972," and, therefore, insufficient to establish that the practice in effect in 1972 was different than that utilized in 2002. Court's Opinion, at 17. The Court's conclusion fails to recognize the alleged change in practice at issue - specifically, the method for determining a majority vote, not the method for determining a quorum. Plaintiffs have not alleged a

change in the minimum number of members required to be present in order to transact business; instead, they are alleging a change in the minimum number of votes needed to nominate a candidate when there is a vacancy.

As Ms. Peters explained, the Democratic Party had no rules to determine whether a quorum existed, and that, in the absence of such rules, she relied on Roberts Rules of Order, which specified that the determination of the existence of a quorum was the prerogative of the chair. She further testified that the existence of a quorum "never came up." It is important to note, however, that the answer to the question of whether a quorum existed was subsumed in the determination of whether there was a requisite majority vote. If there were enough votes to constitute a majority of authorized members, there was no need for an independent determination of the existence of a quorum. Ms. Peters' testimony establishes that the practice of determining a majority vote changed between 1972 and 2002.

Additionally, the two letters from the Texas Secretaries of State in 1994 and 2002 bolster, rather than rebut, Plaintiffs' allegations. These two letters are important and complex, and shall be examined in turn.

The first letter is from the then Secretary of State, John Hannah, to the El Paso County Republican Party. In his letter, he advises the Republican Party that "the membership of a county executive committee consists of its *actual* members, as opposed to its *authorized*

members."[15] Secretary Hannah arrives at this conclusion based on a change in the Texas Election Code. Prior to 1985, the Texas Election Code supported the practice

---

[15] Secretary Hannah provides a helpful example, worth repeating here, of the ramifications of this advice:

> A county has 1,000 county election precincts. After the general and runoff primary elections, a county chair and 500 precinct chairs are elected. Subsequently, 100 precinct chairs are appointed from100 of the 500 county election precincts from which no chair was elected. They are appointed at a meeting with a majority of the membership present, that being 251. At this point, a vacancy in the office of the county chair arises. The actual membership of the county executive committee now consists of 600 precinct chairs. To fill the vacancy in the office of county chair, a majority of the county executive committee (301) must be present. To win the office, a candidate must obtain a majority (152) of those present. (*Under our previous interpretation and under the former Election Code of 1951, those figures would have been 501 and 252, respectively.)*

Letter of September 8, 1994, from John Hannah, Texas Secretary of State, to Jan Sumrall [hereinafter Hannah Letter]. (emphasis added). The parenthetical portion of Secretary Hannah's example is of particular importance in demonstrating that the method for determining a majority vote had changed.

"that a county executive committee was composed of its *authorized*, as opposed to *actual*, membership." Hannah Letter, at 1-3. In 1985, the legislature amended the Election Code in such a way as to allow the Secretary of State to reinterpret the membership of a county executive committee as being composed of its *actual* rather than *authorized*, members. *See id.* (stating Secretary Hannah's belief that "the legislative history shows that the Texas Legislature intended to change the definition of membership on a county executive committee when it repealed former article 13.18, subdivision 1, and enacted section 171.002(a) when the Election Code was recodified in 1985" and citing Tex. Elec. Code. Ann. Art. 13.18, subd. 1 (Vernon Supp. 1985) (repealed 1985)).

The Court's majority opinion is correct that "the relevant law in place in 2002 [which is largely the law adopted in 1985] does not make an explicit authorized versus actual distinction." Court's Opinion, at 14. Nevertheless, in the absence of such definitive law, it is the duty of the chief election officer of the state, namely, the Secretary of the State, to interpret these laws so that they may be put into practice. *See* Tex. Elec. Code, §§ 31.001, 31.003. Secretary Hannah thus advised the Republican Party of El Paso that the 1985 change in election law required that the membership of county executive committees be comprised of its actual members, rather than authorized members, as was the practice prior to the 1985 amendments.

It is important to note that Secretary Hannah's advice in this matter applied only to county executive committees, not precinct or party executive committees, which are the committees in question in this case. Secretary Hannah concluded his letter, however, with

an interpretation of the membership of party and precinct executive committees, stating that "the membership of party district and precinct executive committees *continues* to be comprised of their authorized memberships." Hannah Letter, at 4. That is to say, unlike its effect on county executive committees, the 1985 amendment did not change the definition of the membership of precinct or party committees, which continued to be based on their authorized memberships.

Secretary Hannah's observations about the historical practice of defining membership of county executive committees prior to 1985, and more importantly precinct and party executive committees both prior to and after 1985, are, therefore, consistent with Ms. Peters' observation and practice in 1972 of requiring that "a majority of those precincts where you could possibly elect or have a committee member" vote in favor of a nominee in order to fill a vacancy. *See* Testimony of Joyce Peters.

The second letter is from Ann McGeehan, Director of Elections, to the Bexar County Democratic Party, dated July 17, 2001. This letter purports to supercede, and in fact, disagree with Secretary Hannah's interpretation of the membership of precinct executive committees as being composed of its authorized members. *See* Letter of July 17, 2002 from Ann McGeehan, Director of Elections, to Gabe Quintanilla [hereinafter McGeehan Letter]. Interpreting the laws enacted in 1985 that govern the membership of precinct executive committees, Director McGeehan concludes that the membership of *precinct* executive committees should be defined in the manner that Secretary Hannah defined the membership of *county* executive committees, namely, by actual, rather than authorized,

members. Although Director McGeehan does not explicitly state that this is a change from the practice in effect prior to this decision, she does "caution county executive committees to be mindful of a possible challenge from the U.S. Justice Department," *Id.* at 4.[16]

Instead of heeding Director McGeehan's warning, the Democratic Executive Committee of Precinct 1 nominated Edmundo Zaragoza as its candidate for Justice of the Peace, Precinct 1, Place 3, by a majority of actual, not authorized, members of the Executive Committee without preclearance from the Department of Justice. Director McGeehan's cautionary note is one more piece of evidence that the practice observed and employed by Joyce Peters in 1972 when she was Chairman of the Bexar County Democratic Executive Committee was, as Plaintiffs have contended, to require a majority vote of the authorized members of the precinct executive committee to elect a nominee to a vacancy.

III.

---

[16] By way of example, Director McGeehan warns that "if the county executive committee knows it has experienced losses in minority representation on the precinct executive committee, and in particular if the current committee is not representing the demographic segments of the current precinct, the county would be well-advised to review the possibility of appointing replacements before engaging in a nomination process with diminished minority representation." McGeehan Letter, at 4. She was admonishing, in other words, that the use of the actual, rather than authorized, members to nominate candidates may have the effect of diluting minority vote in violation of the Voting Rights Act. Such a change, as Director McGeehan intimates, are exactly the type of change the Department of Justice is required to preclear before its implementation.

To conclude, in respectful disagreement with the Court's majority opinion, I find that the Plaintiffs have adequately demonstrated that the practice of the precinct executive committee in place in 1972 for filling nominee vacancies differed from the practice employed in 2002 to nominate Edmundo Zaragoza as the Democratic candidate for Justice of the Peace, Precinct 1, Place 3. In 1972, candidates were nominated to fill vacancies by a majority of the *authorized* number of members of precinct executive committees. In 2002, and specifically, on July 25th of that year, a lesser number of votes - a majority of the *actual* members - was utilized to place Edmundo Zaragoza on the ballot as the Democratic nominee for Justice of the Peace. Such a change was not precleared by the Department of Justice. Accordingly, I would grant the relief requested by Plaintiffs.

SIGNED this 10th day of April, 2003.

William Wayne Justice
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SERGIO J. RODRIGUEZ; JOSE G. FARIAS; DOROTEO M. MONTELONGO; RUBEN TEJEDA; MAURICIO ARAGON; GEORGE AGUILAR; MARCARIO R. RAMIREZ; TROY HITCHINGS; DIANE PATTERSON LOPEZ; and MARK OLIVARES,
Plaintiffs,

v.

BEXAR COUNTY, TEXAS; COMMISSIONERS COURT OF BEXAR COUNTY, TEXAS; REPUBLICAN PARTY OF BEXAR COUNTY, TEXAS; ROY BARRERA, JR., in his official capacity as Chairperson of the Republican Party of Bexar County, Texas; DEMOCRATIC PARTY OF BEXAR COUNTY, TEXAS; GABE QUINTANILLA, in his official capacity as Chairperson of the Democratic Party of Bexar County, Texas,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that SERGIO RODRIGUEZ, *et al.*, Plaintiffs, in this cause, appeal to the United Stated Supreme Court from the Opinion and final judgment of the Three-Judge District Court in this cause. The Opinion which contains the final judgment appealed was signed and entered on April 14, 2003, denying

Plaintiffs any relief in their cause of action pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, which challenged changes in practices and procedures affecting voting made and implemented by Defendants.

DATED: May 14 , 2003
Respectfully submitted,

JUDITH SANDERS-CASTRO
SBN: 17595255
9122 Autumn Skies
San Antonio, TX 78254
(210) 680-7746 [telephone]
(210) 680-2933 [facsimile]

JAMES C. HARRINGTON
SBN: 09048500
Texas Civil Rights Project
2212 Martin Luther King Blvd.
Austin, TX 78701-4210
(512) 474-5073 [telephone]
(512) 474-0726 [facsimile]

LES MENDELSOHN &
ASSOCIATES, P.C.
110 Broadway, Suite 500
San Antonio, TX 78205
(210) 222-2271 [telephone]
(210) 230-8914 [facsimile]

By:
LES MENDELSOHN
SBN: 139310000
ATTORNEYS FOR
PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was forwarded on this 14th day of MAY, 2003, VIA U.S. MAIL to the following counsel of record:

C. Robert Heath, Sydney W. Falk, Jr., David Mendez
ATTORNEYS FOR BEXAR COUNTY, TEXAS and
BEXAR COUNTY COMMISSIONERS COURT
BICKERSTAFF, HEATH, SMILEY, POLLAN,
KEVER & McDANIEL, L.L.P.
1700 Frost Bank Plaza
816 Congress Avenue
Austin, TX 78701-2443
(512) 320-5638 [facsimile]

Ronald D. Ederer
ATTORNEY FOR THE REPUBLICAN PARTY OF BEXAR COUNTY, TEXAS
Chairperson of the Republican Party of Bexar County
Ederer, Price, Parker & Dickerson, L.L.C.
7800 I. 10 West, Suite 135
San Antonio, TX 78230
(210) 892-5510 [facsimile]

Gabe Quintanilla
CHAIRPERSON OF THE DEMOCRATIC PARTY OF BEXAR COUNTY
127 Lewis
San Antonio, TX 78212
(210) 226-2201 [facsimile]

LES MENDELSOHN

28 U.S.C. § 2284 Three-judge court; when required; composition; procedure

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

> (1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.
> (2) If the action is against a State, or, officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and Attorney General of the State.
> (3) A single judge may conduct all proceedings except the trial, and enter orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of the three judges of an application for a preliminary injunction. . . .

42 U.S.C. § 1973c, Voting Rights Act

Sec. 1973c Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not

have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(Pub. L. 89-110, title I, Sec. 5, Aug. 6, 1965, 79 Stat. 439; redesignated I and amended Pub. L. 91-285, §§ 2, 5, June 22, 1970, 84 Stat. 314, 315; Pub. L. 94-73, Title II, 204, 206, Title IV, § 405, Aug. 6, 1975, 89 Stat. 402, 404.)

The Texas Constitution
Article 5 - JUDICIAL DEPARTMENT
Section 1 - JUDICIAL POWER; COURTS IN WHICH VESTED

The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law.

The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto. (Amended Aug. 11, 1891, Nov. 8, 1977, and Nov. 4, 1980.)

The Texas Constitution, Article 5
Section 18 - DIVISION OF COUNTIES INTO PRECINCTS; ELECTION OF CONSTABLE AND JUSTICE OF THE PEACE; COUNTY COMMISSIONERS AND COUNTY COMMISSIONERS COURT

(a) Each county in the State with a population of 50,000 or more, according to the most recent federal census, from time to time, for the convenience of the people, shall be divided into not less than four and not more than eight precincts. Each county in the State with a population of 18,000 or more but less than 50,000, according to the most recent federal census, from time to time, for the convenience of the people, shall be divided into not less than two and not more than eight

precincts. Each county in the State with a population of less than 18,000, according to the most recent federal census, from time to time, for the convenience of the people, shall be designated as a single precinct or, if the Commissioners Court determines that the county needs more than one precinct, shall be divided into not more than four precincts. Notwithstanding the population requirements of this subsection, Chambers County and Randall County, from time to time, for the convenience of the people, shall be divided into not less than two and not more than six precincts. A division or designation under this subsection shall be made by the Commissioners Court provided for by this Constitution. Except as provided by this section, in each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in a county with a population of less than 150,000, according to the most recent federal census, in any precinct in which there may be a city of 18,000 or more inhabitants, there shall be elected two Justices of the Peace, and in a county with a population of 150,000 or more, according to the most recent federal census, each precinct may contain more than one Justice of the Peace Court. Notwithstanding the population requirements of this subsection, any county that is divided into four or more precincts on November 2, 1999, shall continue to be divided into not less than four precincts.

Tex. Loc. Gov't. Code , § 81.021. Change in Precinct Boundaries

(a) A commissioners court that orders a change in the boundaries of commissioner or justice precincts may specify in its order an effective date of the change that is

not later than January 1 following the next general election. An election for precinct office occurring after the date that the order is issued but before the effective date of the change in boundaries shall be held in the precincts as they will exist on that effective date. A person who has resided in the area included in a new precinct for the period required for eligibility to hold office is not made ineligible on the ground that the precinct has not existed for that period.

(b) The term of office of a commissioner, justice of the peace, or constable who holds office at the time a change in precinct boundaries becomes effective is not affected by the change, regardless of whether the change places the officer's residence outside the precinct for which the officer was elected. The officer is entitled to serve for the remainder of the term to which the officer was elected.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

Tex. Elec. Code, § 202.003. New Office

(a) Subject to Subsection (b), an election for the first full term of an office for which no previous election has been held is governed by the same provisions as an election for the remainder of an unexpired term, and for that purpose, references in this chapter to an unexpired term include a full term in the case of those offices.

(b) If an Act of the legislature creating an office prescribes a date of creation that is later than the effective date of the Act, and if an authority authorized to create the office at an earlier date has not done so, the office shall appear on the ballot as follows:

(1) if the date of creation occurs in an even-numbered year, the office appears on the ballot in that even-numbered year;

(2) if the date of creation occurs on or before March 1 of an odd-numbered year, the office appears on the ballot in the preceding even-numbered year; and

(3) if the date of creation occurs after March 1 of an odd-numbered year, the office appears on the ballot in the subsequent even-numbered year.

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986.

Amended by Acts 1993, 73rd Leg., ch. 728, § 72, eff. Sept. 1, 1993.

Tex. Elec. Code, § 276.006. Changing Electoral Boundaries of Certain Political Subdivisions

A change in a boundary of a territorial unit of a political subdivision other than a county from which an office of the political subdivision is elected is not effective for an election unless the date of the order or other action adopting the boundary change is more than three months before election day.

Added by Acts 1987, 70th Leg., ch. 472, § 59, eff. Sept. 1, 1987. Amended by Acts 1999, 76th Leg., ch. 995, § 1, eff. Jan. 1, 2000.

Tex. Elec. Code, § 171.022. Committee Composition

(a) A county executive committee consists of:

(1) a county chair, who is the presiding officer, elected at the general primary election by majority vote of the

qualified voters of the county who vote in the primary on that office or appointed by the county executive committee as provided by this subchapter; and (2) a precinct chair from each county election precinct, elected at the general primary by majority vote of the qualified voters of the precinct who vote in the primary on that office, subject to Section 171.0221, or appointed by the county executive committee as provided by this subchapter.

(b) Except as provided by Subsection (d), if no candidate receives a majority of the votes, a runoff to determine the office is conducted in the same manner as a runoff primary election to determine a nomination for public office. The candidates to be in a runoff are determined in the same manner as candidates in a runoff for a nomination.

(c) Each committee member serves for a term of two years beginning the 20th day after runoff primary election day.

(d) The state executive committee by rule may provide for the election of the county chair or precinct chairs of a particular county by plurality vote.

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986.

Amended by Acts 1993, 73rd Leg., ch. 728, § 63, eff. Sept. 1, 1993; Acts 1997, 75th Leg., ch. 499, § 1, eff. Sept. 1, 1997; Acts 1997, 75th Leg., ch. 864, § 114, eff. Sept. 1, 1997; Acts 1997, 75th Leg., ch. 1349, § 59, eff. Sept. 1, 1997.

§ 31.001. Chief Election Officer

(a) The secretary of state is the chief election officer of the state.

§ 31.003. Uniformity

The secretary of state shall obtain and maintain uniformity in the application, operation, and interpretation of this code and of election laws outside this code. In performing this duty, the secretary shall prepare detailed and comprehensive written directives and instructions relating to and based on this code and the election laws outside this code. The secretary shall distribute these materials to the appropriate state and local authorities having duties in the administration of these laws.